

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In reply refer to:
1800D2 VM-547

January 3, 1997

Christopher D. Imlay, Esq.
Booth, Freret & Imlay
1233 20th Street N.W., Suite 204
Washington, D.C. 20036

In re: Station WNNN(FM), Canton, New Jersey
Request for Declaratory Ruling

Dear Mr. Imlay:

This letter refers to the above-captioned Request for Declaratory Ruling which you filed on behalf of PJF Broadcasters, Inc. ("PJF"), licensee of Radio Station WNNN(FM), Canton, New Jersey. In that document, you request that the Commission issue a declaratory ruling delineating the limitation of local zoning and other local and state regulatory authority over Station WNNN's communications antenna facilities in Greenwich Township, New Jersey ("township"). The township opposes the request.

According to your request, PJF filed an application for variance with the township requesting permission to add an additional 200 feet to its existing 275 foot antenna tower. The local ordinance restricts height to a maximum of 70 feet. You claim that the township unreasonably delayed consideration of PJF's application for variance, exacted excessive fees and unfairly dismissed its application. You allege that PJF fully cooperated with the township and paid all of the escrow money the township ordered it to pay except for the last payment. You state that PJF refused to pay the last escrow assessment because it was told by a zoning board member that its application was set to be denied regardless of payment. Thereafter, the township dismissed PJF's application as incomplete for failure to pay the last escrow payment.

In response, the township claims that it legitimately used all of the funds for the review of PJF's application and cites to the township resolution establishing escrow fees (your Exhibit C) which refers to the township's use of escrow fees for "professional review and services" to engage an engineer to review the technical aspects of the application and hearing costs. The township further states that it has never ruled on the merits of the application and thus PJF should proceed locally until it has exhausted all of its local remedies, administrative and judicial. It denies that the escrow was unfairly exacted or that the township had prejudged the application and determined to deny it without giving it full consideration. The township states that the application was being given serious consideration, that it had dismissed the application once before as incomplete on its merits, and that safety was a very serious issue since the existing 275

foot tower had once fallen and blocked the roadway along which the site is located. The township states that it was carefully examining the merits of PJF's claim that the proposed tower could safely occupy the space on which it intended to build, especially considering the history of the existing tower. It also claims that most delays were due to PJF's own lack of preparation and that it made every effort to expedite the application.

A request for preemption in cases such as this must be accompanied by a showing that all nonfederal administrative remedies have been exhausted. *See Town of Deerfield, NY v. FCC*, 992 F.2d 420 (2d Cir. 1992). An exception to the requirement that a party exhaust all administrative remedies is a showing that continued pursuit of the matter at the local or state level would be futile. This showing must be supported by facts to show that it is certain that the claim would be denied, not merely doubt that further action would result in a different outcome, *see Parham v. Carrier Corp.*, 959 F.2d 655 (5th Cir. 1993), or a conclusion that the procedures are annoying, bureaucratic, or unpromising. *See Smith v. Blue Cross and Blue Shield of Wisconsin*, 9 F.3d 383 (7th Cir. 1992). The party seeking to invoke the exception has the burden of producing some evidence that continued pursuit through available channels would be futile. The subjective belief or conclusionary assertion will not suffice. *Id.*

Your request for a declaratory ruling is denied for failure to exhaust the nonfederal administrative remedies available to PJF. There is no dispute that the township denied PJF's application for a variance because of its failure to make an escrow payment. The township consequently has never ruled on the merits of the application.

To be sure, PJF has asserted that the escrow payments were excessive and that making the final payment requested by the township would have been futile. But these conclusory assertions are not supported by sufficient evidence. PJF's request does not provide evidence substantiating its claim that the escrow fees requested by the township were excessive. Moreover, PJF's claim of futility is based on the statement of an unidentified "member of the Board of Zoning Adjustment that no matter whether the payment was made or not, the application would be denied." This hearsay statement is unsupported by any record evidence and is inadequate to carry PJF's burden of producing evidence to show that pursuit of the township's variance process would have been futile. *Cf.* 47 C.F.R. § 25.104(d) (all allegations of fact contained in petitions requesting preemption of local zoning of earth stations "must be supported by affidavit of a person or persons with personal knowledge thereof"). We accordingly decline to issue the declaratory ruling you request.

IT IS THEREFORE ORDERED that the Request for Declaratory Ruling filed on behalf of PJF Broadcasters, Inc. IS DENIED. This action is taken by the Chief, Policy and Rules Division, Mass Media Bureau, under authority delegated by Sections 0.283 and 0.204(b) of the Commission's Rules, 47 C.F.R. §§ 0.283, 0.204(b).

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

cc: Theodore E. Baker, Esq.